No. 10276.

IN THE

Supreme Court of Illinois,

OCTOBER TERM, A. D. 1915.

(In Vacation)

J. B. FERGUS and FREDERICK W. BURLINGHAM,
Appellees,

vs.

ANDREW RUSSELL, Treasurer, and JAMES J. BRADY, Auditor of Public Accounts,
Appellants.

Appeal from Circuit Court, Sangamon County.

Honorable James A. Creighton, Trial Judge.

The Petition of Rufus M. Potts, Insurance Superintendent, for Re-Hearing.

A. A. McKINLEY,
CHARLES H. SHAMEL,
CYRIL W. ARMSTRONG,
Solicitors for Rufus M. Potts, Insurance Superintendent of Illinois, Petitioner.

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THE PETITION OF RUFUS M. POTTS, INSURANCE SUPERINTENDENT, FOR REHEARING.

Comes now Rufus M. Potts, Insurance Superintendent of Illinois, whose interests, as such Insurance Superintendent, have been prejudicially affected by the opinion and decree rendered by this court in this case, and petitions the court for a rehearing in so far as he is or has been affected, as such Insurance Superintendent, by such opinion and decree, and in aid thereof, respectfully calls the attention of the court to the following facts:

STATEMENT OF FACTS.

Realizing that it is the desire of the court that no error should be permitted and that there should be a full hearing upon every question involved in the

case, the following facts are cited to show that this petitioner did not have such a hearing and was, by reason of such facts, prevented from fully presenting to the court his entire defense and position:

At the request and suggestion of the attorney general, made in open court, this petitioner was represented in the court below by counsel of his own selection in so far as this petitioner was affected by the allegations in appellees' amended bill in relation to the right of the legislature to appropriate for the expenses of the Insurance Department for the purpose of retaining counsel. **The trial court sustained every contention of this petitioner.** This petitioner was represented in this court, upon motion duly made and granted, by counsel of his own selection * * * Andrew Russell, *et al.,* represented by the Attorney General, are appellants in this court. On September 10, 1915, the attorney general filed appellants' statement, brief and argument in this court; this consisted of 103 pages, **but contained not one word in relation to, and cited no authorities against, said right of the legislature to appropriate for the expenses of the Insurance Department,** or any other department, for the purpose of retaining counsel, but on the contrary stated in Division 3 on page 7 of his original brief

> "that each and all of the items of appropriation attacked by the amended bill of complaint are valid appropriations in the discretion of the General Assembly."

Subsequently, the appellees, the governor, and this petitioner filed their statements, briefs and arguments in this court, the appellees, by cross error,

questioning the holding of the trial court as to such right of the legislature to make appropriations to departments for the purpose of retaining counsel. **On October 18, 1915, one or two days before the arguments in this court, the attorney general, for appellants, filed a reply brief of 31 pages, 17 of which were devoted to citation of authorities and arguments in support of such position of appellees and against that of this petitioner, and contrary to his position in his original brief, containing new matter and authorities which this petitioner had no opportunity to answer.**

This petitioner had no notice that said reply brief so filed by the attorney general was to be, or had been, filed. Said reply brief was filed at such a time and under such circumstances that this petitioner had no knowledge of its contents and this petitioner was thereby precluded from replying thereto. The opinion and decree of the court in this case, as to such right of the legislature to make such appropriations, largely conforms to the theory advanced in such reply brief.

POINTS.

And, in further aid of this petition and as grounds therefor, this petitioner states the following cardinal and controlling points misapprehended or overlooked by the court:

1. That the attorney general is not vested with inherent common law powers and duties appertaining to his office under the constitution of which he can not be deprived by the legislature.
2. That at common law the attorney general was not the only law officer of the crown and was not its only representative in the courts.
3. State regulation of insurance was unknown at common law, therefore, the attorney general can have no "common law" powers or duties relative thereto.

To more definitely and clearly present to the court the specific instances wherein, and the erroneous reasoning, based upon misstatements of facts by other courts, whereby, we believe the court has been led to such misapprehensions and to overlook those cardinal and controlling points, we respectfully submit the following.

POINT I.

THAT THE ATTORNEY GENERAL IS NOT VESTED WITH INHERENT COMMON LAW POWERS AND DUTIES APPERTAINING TO HIS OFFICE UNDER THE CONSTITUTION OF WHICH HE CAN NOT BE DEPRIVED BY THE LEGISLATURE.

A.

The court says in its opinion:

"The question presented for our determination is, whether by creating this office (of attor-

ney general), under its well known common law designation the constitution engrafted upon it all the powers and duties of the attorney general, as known at common law, and gave the General Assembly authority to confer and impose upon the Attorney General only such additional powers and duties as it should see fit."

The court answers that question by holding that the attorney general, because mentioned and provided for by the constitution, *eo nomine,* and *ex vi termini,* has all the powers and duties appertaining to that office at common law. We believe that the court misapprehended the powers and duties of that official at common law, the intention of the framers of the constitution and of the people in adopting it, in the assumption that the use of the words "attorney general" in that document implies an officer with all the powers and duties as at common law, and this for two reasons:

1. The Constitution of 1818 did not create the office of attorney general. It made it optional with the legislature whether to elect an attorney general or not. Const. 1818, par. 10 of schedule. The Constitution of 1848 does not provide for the election or appointment of an attorney general. Between 1848 and 1867 the state, in fact, had no attorney general. Every attorney general of Illinois, therefore, from 1818 to 1870 was an officer whose duties were regulated and prescribed by statute. In adopting the Constitution of 1870, did the people have in mind, in the use of the term "attorney general," that kind of an officer known to the law of this state for fifty-two years immediately preceding 1870, or did they have in mind that kind of an officer existing in England more than two hundred and fifty years before that time, whose duties and powers could only be ascertained by an examination of the early English reports, if at all? It

seems to us that there can be but one answer to this question.

2. That constitutions operate prospectively and not retrospectively.

"As a constitution always operates prospectively, unless from the language used or the objects to be accomplished, it is clearly shown that some provision was intended to operate retrospectively, construction therefore must be in favor of prospective operation, unless an intent to the contrary is clearly established."

8 Cyc. 731-4.

Cooley's Principles of Const. Law, p. 388.

B.

The court, in its opinion, quotes with approval from the case of Chicago Mutual Life Indemnity *Association* v. *Hunt,* 127 Ill. 257, as follows:

> "We are of the opinion that the power of the attorney general to file the information in no way depended upon the communication made to him by the auditor, but came within the purview of those powers which are inherent in his office";

and the court, in its opinion in the case at bar, then said:

> "We there held that there were certain powers which were inherent in the office of attorney general. These could be only such powers as the attorney general possessed at common law and which attached to that office when it was created in the manner it was by the constitution";

and this court further says in its said opinion:

> "The attorney general, as herein before pointed out, possesses well defined common law powers which are inherent in his office * * * Some of the powers attempted to be conferred and some of the duties attempted to be imposed upon the attorney general were powers and duties which were already conferred and imposed

> upon him by the constitution, as they were inherent in his office''.

We believe that the court has overlooked the fact that

> ''An inherent power is an authority possessed without its being derived from another; a right, ability or faculty of doing a thing, without receiving that right, ability or faculty from another'', (Bouvier),

and that a power which is traceable to any human source is not an inherent power but a granted power. We respectfully point out that the court has overlooked the fact that the attorney general at common law had no inherent power; that the only inherent power at common law was in the king, who, claiming such inherent power, based thereon his claim to rule by ''Divine right.'' The court in its opinion correctly said:

> ''Under our form of government all of the prerogatives which pertain to the crown in England under the common law are here vested in the people'',

but we believe the court overlooked the suggestion in our brief (pp. 18 and 19) that under our government all power is inherent in the people, (Const. 1818, Art. VIII, Sec. 2; Const. 1848, Art. XIII., Sec. 2), and the fact that the constitution is a grant of power to executive officers of the state, and therefore, any power which an executive officer possesses by or through the constitution is necessarily a ''granted'' power and not an ''inherent'' power.

Field v. *People,* 2 Scam. 79.

C.

The court states in its opinion:

> "It will be observed that the constitution confers no express powers upon the attorney general and prescribes no express duties for him to perform. It simply provides that he shall perform such duties as may be prescribed by law." p. 22.

The court also says:

> "Our attention is called to the case of *Field* v. *The People,* 2 Scam. 79, where, in considering the powers of the governor we held that officer had no powers except those expressly granted by the constitution. The reasoning in that case can have no application here because the governor, being an officer unknown to the common law, has no common law powers, while the attorney general, as has been pointed out, has well defined common law powers which are inherent in his office." p. 27.

We respectfully suggest that the court has misapprehended and overlooked our reasons for citing the Field case, *supra.* That decision lays down fundamental principles of law, which we believe to be pertinent and decisive as to points in this case, and which have, not only never been departed from by this court, but have been relied upon and repeatedly cited with approval as basic principles of our jurisprudence. Such principles are:

> "The constitution is a limitation upon the powers of the legislative department of the government; but it is to be regarded as a grant of powers to the other department. Neither the executive nor the judiciary, therefore, can exercise any authority or power, except such as is clearly granted by the constitution."
>
> "We should look to the division as actually

made, to see what powers are clearly granted; for such only can be exercised. As no power then, is granted to the governor by these sections, it necessarily follows that none can be implied. A power by implication, can only be claimed as necessary to the exercise of one expressly granted."

"But it must be obvious that the practice and maxims of governments widely different from ours in their character, and the theory and principles upon which they are constituted, must be incongruous with ours, and inapplicable to a question involving the powers and duties of its functionaries."

"The general government differs from ours in its powers and attributes; and although we have adopted the common law of England, we have neither adopted the form of that government, nor recognized the principles upon which it is founded. According to the theory of that government, the king is the sovereign power of the state. When a question of prerogatives, therefore, arises there, recurrence is had to the charters of the people's rights and liberties, to ascertain whether the right in question has been surrendered by the king to the people; and if the grant can not be shown, the right is adjudged to the king, upon the principle that all rights of which he has not divested himself, by express grant to the people, come within his prerogative. But upon the principle of our government, that the sovereign power of the state resides in the people, and that only such powers as they have delegated to their functionaries, can be exercised, where a claim of power is advanced by the executive, the question is, not whether the power in question has been granted to the people, but whether it has been granted to the executive; and if the grant can not be shown he has no title to the exercise of the power."

"The settled doctrine is, that construction for the purpose of conferring power, should be

resorted to with great caution, and only for the most persuasive reasons."

Field v. *People,* 2 Scam. 79.

Petitioner's brief, pp. 7, 19, 26.

The court says in its opinion in the case at bar that the constitution confers no express powers on the attorney general. We believe the court has overlooked the point that the Field case, *supra,* is authority for the position that the attorney general derives no powers from the constitution of 1870:

"If no powers are expressly granted (by the constitution) none can be implied, as a power by implication can only be claimed as one necessary to the exercise of one expressly granted."

Field v. *People, supra.*

Petitioner's Brief, pp. 19, 20, 21 and 22.

D.

The court, in its opinion, has placed great reliance upon, followed and quoted profusely from the case of *Dahnke* v. *The People,* 168 Ill., 102. We believe the court has overlooked the point that the facts in that case are not on a parity with the facts in the case at bar. As to the case at bar, the court correctly stated in its opinion:

"There is no question but by the amended act of 1899 the general assembly intended, and attempted, to confer upon the insurance superintendent power to do all things in reference to insurance which had theretofore been required to be done by the attorney general."

In the Dahnke case, *supra,* however, Mr. Justice Magruder, in delivering the opinion of the court, said:

> "We know of no law or statute, and have been referred to none, which authorizes the board of country commissioners of Cook County to assign the court rooms in the court house in that county to particular judges";

and, to further refute the contention that a statute had been passed conferring powers and duties on the county board which appertained to the sheriff, Mr. Justice MAGRUDER said:

> "In the second place, section 24 of the act in regard to sheriff provides as follows: 'When the sheriff goes out of office, he shall deliver to his successor all writs, process, papers and property attached or levied upon, except such as he is authorized by law to retain, and also the possession of the court house and jail of his county, and shall take from his successor a receipt,' etc. (2 Starr & Cur. Stat. 2d ed. p. 3770.) Here is a provision which directs the sheriff specifically when he goes out of office to deliver the possession of the court house to his successor. No other inference is possible than that, during his term of office, he was to have the possession of that which, at the close of such term, he was to deliver over to his successor. If, therefore, the sheriff is entitled to hold possession of the court house, it would seem to follow that the county board has no right to such possession, except in the manner already specified."

As the sheriff, therefore, was by statute, authorized to have possession of the court house, and as there was "no law or statute" authorizing the board of county commissioners to supersede the sheriff in that possession, the point here involved in the case at bar was not before the court in the Dahnke case, and such remarks of the court as were therein made with reference to common law and inherent powers of the sheriff were *obiter dictum,* aside the point and not necessary to a decision of that case.

We believe that the court has overlooked the principle as to dictum, enunciated in the case of *Cohens* v. *Virginia,* 6 Wheat (U. S.) 264, 399, 5 L. Ed. 257 (and quoted in *Mayer* v. *Erhardt,* 88 Ill. 452, 457) Marshall, C. J., where it said:

> "It is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be disregarded, but ought not to control the judgment in a subsequent suit when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the court is investigated with care and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated."

The pertinency of Mr. Chief Justice Marshall's observations as to dictum will be apparent to the court when we point out that by adopting verbatim a portion of the opinion in the Dahnke case, *supra,* in its decision of the Fergus case, at bar, the court unquestionably overlooked the fact that a quotation made in the Dahnke case, *supra,* from Murfree on Sheriffs, by Mr. Justice Magruder, was incomplete, commenced in the middle of a sentence and stopped not only in the middle of a paragraph, but in the middle of a sentence; that the balance of that sentence should be given due weight and consideration, especially in view of the acknowledged "changes of times and circumstances, and the requirements of public policy embodied in positive law" rendered necessary and expedient in the wisdom of the people of this state as to insurance since Murfree wrote in 1884.

That quotation from Murfree, with the balance of the sentences and paragraph added and italicized, is:

> "*As therefore* the very name and office of sheriff, implies the possession by that functionary of all the powers, and the obligation to perform all the duties of a common law sheriff, except so far as those powers and duties may have been modified by state constitutions or constitutional statutes, *he will be considered in these pages as a common law officer. Due regard will be paid to the modification which the changes of times and circumstances, and the requirements of public policy embodied in positive law have rendered necessary and expedient.*"

E.

The court, in its opinion, speaking of the Dahnke case, *supra,* said:

> "That case is analogous to the one now under consideration. It differed from the case at bar only in this particular: The constitution, in creating the office of attorney general, provided that he should perform such duties as may be prescribed by law, whereas, there is no provision whatever in the constitution as to what duty shall be performed by the sheriff."

That statement is also true as to the provisions of the constitutions of other states, whose decisions were cited in support of the view taken in the Dahnke case, *supra,* in relation to the duties of the sheriff in those states. But we believe that the court has overlooked the fact that such constitutional provisions as to the sheriff in this and such other states, where no expression is to be found in the constitution as to the powers and duties of the sheriff, will very much more readily bear the construction of common law constitutional powers than the constitutional in-

junction that the attorney general "shall perform such duties as may be prescribed by law." We believe that this oversight will be best realized by the court by citing the provisions of the constitution of Illinois of 1870 as to the powers and duties of the sheriff, the attorney general and justices of the peace, police magistrates and constables, all of which officers are of ancient origin and well known to the common law, and whose duties and powers were well known to the common law:

> As to the sheriff's powers and duties, the constitution is silent;
>
> As to the attorney general's powers and duties it is provided in the constitution that he "shall perform such duties as may be prescribed by law";
>
> As to justices of the peace, police magistrates and constables, the only constitutional provision applicable to them is that they "shall perform such duties and receive such compensation as is or may be provided by law."

We believe that the court has overlooked the point and misapprehended the meaning of these several constitutional provisions in its opinion in the Fergus case at bar, in that the application of the rule of *"eo nomine"* and *"ex vi termini"*, while possible as to the sheriff, is inapplicable as to the attorney general, the constitutional injunction as to whom is that *"he shall perform such duties as may be prescribed by law"*, in the face of the long line of decisions of this court that justice of the peace, who, the constitution provides, *"shall perform such duties and receive such compensation* AS IS *or may be provided by law"*, have no common law powers, but are dependent entirely upon the constitution and statutes for their

authority and jurisdiction and who can take no powers by implication.

Moore's Justice, Ch. 2, Sec. 36.
Robinson v. *Harlan*, 1 Scam. 237.
School Inspectors v. *People*, 20 Ill. 105.
Dunbar v. *Hallowell*, 34 Ill. 169.
Evans v. *Bouton*, 85 Ill. 579.

We respectfully submit that if justices of the peace, common law officers of ancient origin with well known and well defined common law powers and duties, have no common law powers, duties or functions by virtue of the constitution which provides that they shall perform such duties *as is or may be provided by law*, then that the court, in holding that the attorney general has inherent common law powers and duties by virtue of the same constitution which provides that the attorney general shall perform such duties *as may be prescribed by law*, has overlooked and misapprehended such constitutional provisions and the decisions of this court.

We respectfully submit that the court has overlooked the fact that in the Railroad Tax Cases, 136 Fed., 233, where the constitution of Arkansas provided that the attorney general

> "shall perform such duties as may be prescribed by law",

precisely the same provision as is in the Constitution of Illinois, it was decided that he had no powers except such as are given by the statutes of the state.

Railroad Tax Cases, 136 Fed., 233.

F.

We believe that the court overlooked the points made in our brief (25, 26, 27) to the effect that common law powers and duties of the attorney general had been taken away from him by the legislature and that such statutes had been held constitutional by this court.

We believe, also that the court has overlooked the fact that powers and duties possessed by sheriffs, justices of the peace, constables, coroners and secretaries of state at common law are now no longer possessed by them, having been taken away by statute, among which are the following:

> At common law the justice of the peace was the keeper of the records of the county.
>
> 1 Black Comm., 349.

> "The coroner is also a conservator of the peace within his own county; as is also the sheriff; and both of them may take a recognizance or security for the peace."
>
> 1 Black. Comm., 350.

> Constables, tithing-men, and the like are also conservators of the peace within their own jurisdiction; and may apprehend all breakers of the peace and commit them, till they find securities for their keeping."
>
> *Ibid.*

> "* * * except that secretaries of state are allowed the powers of commitment, in order to bring offenders to trial."
>
> 1 Black. Comm., 338.

The sheriff could apprehend and commit to prison and could bind anyone in a recognizance to keep the peace.

1 Black., 343.

At common law the coroner had to have sufficient estate to maintain the dignity of his office and answer fines set on him for misbehavior.

Ibid.

Each of the citations from Blackstone under this head refer to the common law as of the period a part of the common law of which became the common law of Illinois, by statutory enactment, viz., at 1607.

G.

The court overlooked the following fundamental principles of constitutional construction in arriving at the construction, the accuracy of which is now under consideration:

"Constitutions are of a practical nature founded on the common business of life, designed for common use and fitted for common understandings. The people make them, the people adopt them, and the people must be supposed to read them with the help of common sense."

Story on the Constitution, as quoted with approval in *People ex rel.* v. *McRoberts,* 62 Ill., 38.

and again

"In its (the constitution's meaning) ascertainment we must look at the consequences of a particular construction."

People ex rel, v. *McRoberts,* 62 Ill. 38.

The decision of this court in the case at bar, stated in general terms, is that

> Wherever an officer known to the common law is named in the constitution by the common law designation, there is thereby imported into the constitution as a part thereof, all of the powers, duties and prerogatives of such officer at common law, and such powers, duties and prerogatives become constitutional provisions, and the legislative department of the government has no power to abolish, modify or restrict in any manner any of such common law.

We beg to submit that, apart from every other consideration, the bare statement of this proposition, when fully appreciated as to its sweeping character, profound and fundamental significance, is startling, revolutionary, highly dangerous and contrary to the fundamental principles upon which our institutions are based, viz: that all power is inherent in the people.

By this doctrine there is imported into the constitution bodily, a mass of necessarily more or less vague, indefinite, uncertain and highly difficult to ascertain, rules of the common law to be found only in the scattered volumes of the early English Reports; rules and principles, formulated in so far as they have any definite form, at a time when the political institutions were vastly different than they are today, and which, in the main, must necessarily be in a large measure inappropriate to serve the purposes of the people of the State of Illinois in the year 1915. Such a rule cannot make the constitution "of a practical nature". Such a rule is not consistent with the idea that the constitution is "founded on the common business of life, designed for common use".

nor would such a constitution be "fitted for common understandings."

Could it be said of such a constitution

> "that the people must be supposed to read them with the help of common sense"?

Is it possible that upon reflection the court can say that such a rule is consistent with the fundamental proposition that in the ascertainment of the meaning of the constitution "we must look at the consequences of a particular construction"?

It has heretofore been supposed to be fundamental in our system of government, that it is based upon a written, not an unwritten, constitution. Yet, if two words, the name of a mere office, may import into the constitution a mass of the common law, our constitution is largely an unwritten constitution and not a written constitution.

The offices of Secretary of State, Justice of the Peace, Police Magistrate, Constable, Sheriff and Coroner, were all known at common law. These offices are all referred to in the constitution. Is it possible that the legislature has no power to define, restrict or modify the powers, duties and prerogatives of any of these officers; that we must look alone in the volumes of the English Reports of decisions rendered more than three hundred years ago to find the duties and prerogatives of these officers; that all of these reports, in so far as they refer any where to any of these officers, are embodied in the constitution of the State of Illinois.

We beg to submit that such a conclusion, when its significance is really appreciated, contains none of the elements of constitutional construction which

should prevail as laid down by Judge Story, and approved by this court, either of "common sense," or a "fitness for common understanding," or having due regard for the "consequences" of the rule announced.

POINT II.

THAT AT COMMON LAW THE ATTORNEY GENERAL WAS NOT THE ONLY LAW OFFICER OF THE CROWN AND WAS NOT ITS ONLY REPRESENTATIVE IN THE COURTS.

A.

The court states in its opinion

> "The office of attorney general was one known to the common law, and under the common law the attorney general had well known and well defined and it was incumbent upon him to perform well known and clearly prescribed duties. It is not necessary, and indeed it would be difficult, to enumerate all the powers vested in the attorney general at common law and all the duties which were imposed upon him to perform. It is sufficient for the purposes of the discussion of the point here involved to state that at common law the attorney general was the law officer of the crown and its only representative in the courts. (*Rex* v. *Austen*, 9 Price, 142) (erroneously cited as page 12); *Attorney General* v. *Brown*, 1 Swanst. 294; *Rex* v. *Wilkes*, 4 Burr., 2570". p. 22-23.

We respectfully suggest that the court, in the statement that the attorney general was at common law the *only* representative of the crown in the courts, has misapprehended the opinions cited by the court in support of that statement. The decision in the case of *Rex* v. *Austen, supra,* was rendered in

1821, and was based upon common law as it existed in 1816. Those dates were more than two centuries after the period a part of the common law of which became a part of the law of Illinois, whether it became so by statutory enactment, by constitutional adoption or effect, or through the ordinance of 1787. The statute is

> "That the common law of England, so far as the same is applicable and of a general nature, and all statutes or acts of the British Parliament made in aid of, and to supply the defects of the common law, prior to the fourth year of James the First, excepting the second section of the sixth chapter of 43d Elizabeth, the eighth chapter of 13th Elizabeth, and ninth chapter of 37th Henry Eighth, and which are of a general nature and not local to that kingdom, shall be the rule of decision, and shall be considered as of full force until repealed by legislative authority."

Hurd's Rev. Stat. Chap. 28, 519.
Kochersperger v. *Drake,* 167 Ill. 122-125.
People v. *Kirk,* 162 Ill. 138-151.
Kreitz v. *Behrensmeyer,* 149 Ill. 496-502.

That decision of *Rex* v. *Austen, supra,* was predi cated upon an act of parliament "1st. George IV. Chap. 119, Sec. 41." The reign of George IV. was from Februray 11, 1811, as Prince Regent, until February 23, 1820, and from February 23, 1820, as King, until June 26, 1830. That case cannot be relied upon as authoritative to maintain the proposition that the attorney general was, at common law, the law officer of the crown and its only representative in the courts, for it does not sustain that statement.

We believe the court overlooked and misappre-

hended the obvious fact that this case was not an authority to sustain the proposition that the attorney general was the only representative of the crown in the courts at common law, for the reasons:

First. That no such statement is found in the opinion of the court in that case. The only statement on the subject being in a note appended by the reporter.

Second. The statement of the reporter is only that "the court intended", etc. And this intention was concerning a minor matter of procedure.

Third. Assuming the intention to have been a deliberate holding upon full consideration, still it would only mean that inasmuch as the attorney general had in fact instituted this particular prosecution he would, as to such particular prosecution, of course, necessarily be the only proper legal representative of the crown upon whom a notice should be served of a motion for the discharge of the prisoner.

We respectfully suggest and believe, that the case of *Attorney General* v. *Brown,* 1 Swanst. 294, which is cited by the court in support of its opinion that the attorney general was at common law the law officer of the crown and its *only* representative in the courts, has been misapprehended by the court and does not sustain that proposition. What the court actually said was:

> "The attorney general is an officer of the crown *and* in that sense only, the officer of the public."

The opinion was written in the year 1818 upon facts which arose in the year 1816, which dates are more than two centuries after the date as of which the common law was, in part, adopted in to Illinois.

As a further authority to sustain the statement in its opinion that the attorney general was, at common law, the law officer of the crown and its *only* representative in the courts, the court cites the case of *Rex* v. *Wilkes,* 4 Burr. 2570. That case first came before the court at Michaelmas Term, 1764. That opinion was by the court of King's Bench, but that decision was appealed to the House of Lords and there argued and finally determined. The report of that case as so appealed is found in Wilmot's Opinions, pp. 322 to 340.

> "* * * and Sir John Eardly Wilmot, Lord Chief Justice of the Court of Common Pleas, having conferred with the rest of the judges present, acquainted the House that they all agreed in opinion and then his Lordship delivered their reasons."

We quote from that opinion of the highest court in England finally deciding the case of *Rex* v. *Wilkes,* 4 Burr., 2570, *supra,* on appeal from the decision cited by this court in its opinion in the Fergus case at bar:

> "Before the statute 4 and 5 W. & M., c. 18, every private man might lay his complaint before the court as the King's complainant; this was abused, and was checked by the statute, but it left all other informations as they were." (William and Mary reigned from 1689 to 1702; therefore, that statute was passed over eighty years subsequent to the end of the period the common law of which is in part law in Illinois). * * * *"The arguing that the attorney general only, and no other officer, was entrusted by the constitution to sue for the King, either civilly or criminally, is a fundamental mistake.* The attorney general is entrusted by the King and not by the constitution. It is the King who is entrusted by the constitution.

"The great abilities of the persons who have been appointed to this office have made it figure high in the imagination *and annexed ideas to it which do not belong to it;* for he is but an attorney, though to the King, and in no other or different relation to him than any other attorney is to his employer; and it is by degrees that he hath attained to that rank which he now holds in the law.

"*I find no traces of such an officer for centuries after the conquest;* and that great antiquarian, Spelman, under the word '*serviens ad legem*' considers him, upon the authority of passages cited out of Bracton, as the great officer for pleas of the crown, and thinks the King had a serjeant in every county for that purpose; and in the proclamations made even at this day, before any criminal trial begins, the King's serjeant is mentioned, even before the attorney; and the 5th Edw. 3d, c. 13, which gives an averment against the sheriff's return of imprisonment in cases of outlawry at the King's suit, mentions the King's serjeant before the attorney and subjoins '*or any that will sue for the King'; which is a strong indication that the King's suits were not considered as then appropriated to his attorney;* and he had not then so much as the name 'attorney general,' which means no more than the person generally employed to sue and defend for the King, exactly in the same manner as the person generally employed by your lordship, in your suits, is called Your Lordship's attorney without putting the addition of 'general' to it; and the suits instituted by the King's attorney, or by Your Lordships' attorney, *are both instituted, either by special and particular directions, or under a general authority, which is equivalent to a particular direction for every particular suit;* and a suit instituted by the attorney general is entitled the King and ————, and the jury are sworn between the King and ————, in the same manner as suits between private individ-

uals. Whether the King, when there is an attorney or solicitor general, might, by one of his serjeants, or by his solicitor, when there is an attorney, now file a civil or criminal information, it is not necessary to determine; but the passage, cited out of the Harleian Manuscript, does not decide in the negative; for the first part, in Henry VIII's time, orders the King's solicitor to stop one prosecution and commence another. The office of attorney general was either vacant or full at that time. *If vacant, it proves the solicitor stands in his place; if full, it proves that by particular order, the King's suit is not inseparably attached to the office of King's attorney.*

"The latter part of the passage, containing the resolution of the first and second James I, is only the adjustment of a dispute between the attorney general and the King's serjeant, whether the King's serjeant could institute a suit so as to privilege it with respect to fees, etc., in the ordinary course of proceeding; and it was determined to belong to the attorney general in opposition to the serjeant's claims; *but it does not follow from thence, that the King if he pleased, might not have empowered one of his serjeants to commence it and a special antecedent direction could not be necessary.*"

The full text of the cases of *Rex* v. *Austen,* 9 Price 142, and of *Rex* v. *Wilkes,* Wilmot's Opinions, p. 322, the latter being the opinion in the House of Lords, reviewing on appeal *Rex* v. *Wilkes,* 4 Burr. 2527, *supra,* for the convenience of the court is attached to this petition as an appendix.

B.

In a study of the powers and duties of the attorney general at common law, and the question as to whether or not the attorney general was the only

legal representative of the crown in the courts, it would be well first to consider the advocates or counsel who were authorized to practice in the courts during that period in their order of precedence.

In Cooley's third edition of Blackstone, Book 3, p. 28, a short table is given as follows:

1. The King's Premier Sergeant (so constituted by special patent).
2. The King's Ancient Sergeant, or the eldest among the King's Sergeants.
3. The King's Advocate General.
4. The King's Attorney General.
5. The King's Solicitor General.
6. The King's Sergeants.
7. The King's Counsel, with the Queen's attorney and solicitor.
8. Sergeants at law.
9. The Recorder of London.
10. Advocates of the Civil Law.
11. Barristers.

In the Courts of Exchequer two of the most experienced barristers, called the post-man and tub-man (from the places in which they sit) have also a precedence in motions.

All of these officers, but none others, had audience in the courts.

From the foregoing it will be seen that there were at least seven officers of different titles who might appear for the King, each having well known and well defined duties, and each having his order of precedence in the matter of audience in the courts.

Blackstone Book 1, p. 231.

The coroner and the master of the crown office, called also the king's attorney, had to do with legal proceedings, in that they were the standing officers of the public to examine into informations submitted

by private persons, and if meritorious, to file their in formations in the name of the King.

Blackstone Book 4, p. 309.

And still other actions were brought in the name of the king on information of any person, being first presented to the coroner or the master of the crown office, and if approved by him, were filed in the court of King's Bench. These suits were prosecuted by the person who brought them, and frequently offenders would procure their own friends to bring a suit to forestall and prevent other actions.

Blackstone Book 3, p. 161.

C.

The court says in its opinion:

> "Under our form of government all of the prerogatives which pertain to the Crown in England under the common law are here vested in the people, and if the Attorney General is vested by the constitution with all the common law powers of that officer and it devolves upon him to perform all the common law duties which were imposed upon that officer, then he becomes the law officer of the people, as represented in the State government, and its only legal representative in the courts, unless by the constitution itself or by some constitutional statute he has been divested of some of these powers and duties.
>
> "The constitution provides, as has been noted, that the Attorney General shall perform such duties as may be prescribed by law."

In *Rex* v. *Wilkes, supra,* it is said:

> "Suits instituted by the King's attorney * * * are instituted either by special and particular directions or under a general authority which is equivalent to a particular direction for every particular suit."

We believe that the court has misapprehended the relationship of the attorney general to the crown at common law, as such relationship is stated in *Rex* v. *Wilkes, supra,* and we further believe that the court has improperly conceived the application of that relationship to our form of government, wherein the prerogative which pertained to the crown at common law is vested in the people in Illinois; we believe that, properly applied, that relationship is that the people in Illinois shall direct the attorney general in each specific instance of service or employment, to which end the constitution was framed in the language that the attorney general

> "shall perform such duties as may be prescribed by law"

thereby providing that the people should specifically, through the legislature, at all times control and direct the attorney general.

A comparison of the foregoing quotation with the language used by the Appellate Court in the case of *Hunt* v. *Chicago & Dummy Railway Company,* 20 App. 282, would seem to indicate that the court relied to a great extent upon the statement of the common law found therein without a critical analysis of the English cases there cited. Such an analysis as found under Division A, Point 2, discloses that the Appellate Court was wholly in error as to its statement that

> "THE ATTORNEY GENERAL WAS THE LAW OFFICER OF THE CROWN AND ITS ONLY LEGAL REPRESENTATIVE IN THE COURTS."

The further fact, that neither the Appellate Court nor this court had before it the opinion of the House of Lords in *Rex* v. *Wilkes,* is in itself a sufficient rea-

son why the Appellate Court and this court misapprehended the true status of the attorney general at common law.

D.

If it is a historic fact, as stated by the court, that at common law the attorney general was the only law officer of the crown and its only representative in the courts, there must certainly be some statement of that fact to be found in some English authority or authorities, either the decisions of the courts, the enactments of parliament, the history of the English law and constitution, the history of the English people, or other recognized authority. A statement of a supposed historic fact as to the functions of the attorney general at common law by an American Court, which is contrary to the real fact, cannot change the real facts of English history, and jurisprudence, and such statements of such supposed historic fact, when based upon decisions of the English courts which did not support the facts stated, but on the contrary, show the reverse of the fact stated, cannot possibly be entitled to weight and consideration in now determining such historic fact when the error of such statements by American courts is pointed out and conclusively demonstrated.

We now desire to call the attention of the court in the most solemn and emphatic terms, to the fact, which is a fact, that no book in the English language, written, complied or edited by an Englishman, either the decisions of the courts or acts of Parliament can be found, nor can any history or commentary on the English Constitution or other authority be found or produced which contains a line in support of any

such supposed historic fact as that, at common law the attorney general was the law officer of the crown and its only representative in the courts.

The only authority which tends to sustain any such proposition of alleged historic fact, is certain expressions to be found in certain opinions of certain American courts said to be based upon certain decisions of the English courts, which decisions, when examined, are found not only not to sustain the proposition, but to show the direct reverse.

If a principle of law be announced by a court of last resort it becomes the law whether correctly decided at the time or not, and the principle of *stare decisis* is thereafter applicable to the prior decisions of the court, but if a court states a historic fact and then bases conclusions upon such historic fact, and then it be found that the fact stated is not a fact but on the contrary the direct reverse is true, the principle of *stare decisis* can have no application. The error is one of fact and not of law, and the fact is, that the attorney general at common law was not the only representative of the crown in the courts.

We respectfully and very earnestly submit to the court that it is our belief that the court, in its opinion in this case, has relied upon misstatements as to facts in decisions cited by the court in support of its opinion; and that it has thereby been unwittingly led into error and misapprehension as to the facts upon which those opinions were based and upon which the opinion of the court in this case has, as we believe, been predicated.

III.

STATE REGULATION OF INSURANCE WAS UNKNOWN AT COMMON LAW. THEREFORE, THE ATTORNEY GENERAL CAN HAVE NO COMMON LAW POWERS OR DUTIES RELATIVE THERETO.

State regulation of insurance was unknown at common law. Such insurance contracts as existed at that time, were purely private, civil contracts between individuals, in which the government had no interest whatever. Even in Illinois state regulation of insurance was not attempted in any way during the first fifty years of statehood. The first regulatory statute was enacted in Illinois in 1869, and the provisions of that statute conferred upon our attorney general the first powers and duties he ever had relative to insurance. And these duties were taken away from the attorney general and conferred upon the insurance superintendent by statute in 1899. We submit that the court apparently overlooked the point made in our brief as to this matter. (Brief, pp. 26 and 27.)

We believed that the court overlooked the further principle of law that, unless the general assembly is inhibited by constitutional restriction, it may exercise all governmental powers, executive, legislative and judicial; that the legislature has power, unless inhibited by the state or federal constitution, to establish an office or department of the government and designate the officers who shall exercise the powers and perform the duties or name the officer or person who may select or appoint them to the office.

People v. *Morgan,* 90 Ill. 558, 561.

People v. *Loeffler,* 175 Ill. 85.

In conclusion, we beg to suggest that under the decision arrived at by this court in the case at bar, as we read it, the court intended to decide that all of the common law as it existed in England prior to the year 1607, in so far as it pertains to the powers and duties of the incumbent of any office at common law, the name of which office is used in our constitution to designate an office thereunder, is by the use of such name, imported into our constitution and law and becomes constitutional provisions, notwithstanding they have, centuries since, been discarded by the land in which they grew.

In fact, the opinion as now written will better bear the construction that this court intended to decide that all of the common law as it existed at the time of the adoption of the Constitution of 1870, in so far as it relates to the duties and powers of officers having the same name in each instance, is, by the use of such name, made a part of our constitution and law. The only escape from the latter conclusion is by assuming that the people, who adopted the constitution, intended that only that part of the common law which had prior to 1870 been adopted by statute should be regarded as the law in this state, and on this latter hypothesis (that is that the people in adopting the constitution had in mind the then existing statutes of the state in so far as they were applicable by way of definition of the terms used in the constitution) it would necessarily follow that they had in mind in the use of the term attorney general (as to his duties and powers) the statutory officer then in existence by the statute of this state; that this is the correct view of the true intent of the

people is shown by the provision that he "shall perform such duties as may be prescribed by law."

For these reasons, it is respectfully requested that a rehearing be granted the petitioner in this case, to the end that this petitioner may have an opportunity of presenting to this court, more fully and adequately, the law in relation to the several matters herein suggested, and as to which, up to the present time, he has had no opportunity so to do.

Respectfully submitted,

RUFUS M. POTTS,
Insurance Superintendent.

A. A. MCKINLEY,
CHARLES H. SHAMEL,
CYRIL W. ARMSTRONG,
Solicitors for Insurance Superintendent.

IN THE HOUSE OF LORDS.

Between JOHN WILKES, Esq.; Plaintiff in Error,

AGAINST

The KING, Defendant in Error.

1768. Wilkes against The King. Brown's P. C. Vol. 6. p. 345.

In Michaelmas Term, 1763, Sir Fletcher Norton, Knight, his Majesty's then Solicitor General, (the Office of Attorney General being vacant) filed an Information, "ex officio," in the Court of King's Bench, against the Plaintiff in Error; stating, that before the printing and publishing the seditious and scandalous Libel thereinafter mentioned, to wit, on the 19th April, in the third year of his present Majesty's Reign, his MAJESTY did make and deliver a most gracious Speech from his Throne, to the purport and effect therein set forth; and that the said JOHN WILKES most audaciously wickedly, and seditiously devising, and intending to villify and traduce his MAJESTY, and his Government of this Realm, to impeach and disparage his veracity and honour, and to represent, and cause it to be believed among his MAJESTY's Subjects, that his said most gracious Speech contained Falsities and gross Impositions upon the Public, and that his MAJESTY had suffered the honour of his Crown to be sunk, debased, and prostituted, and had given his Name as a sanction to the most odious measures of Government; and also most wickedly, unlawfully, and seditiously devising, intimating, and endeavoring, as far as in him, the said JOHN WILKES, lay, to excite Disobedience and Insurrection amongst the Subjects of this Realm, and to violate and disturb the public tranquillity, good order, and peace of this Kingdom; after the making and delivery of the aforesaid Speech, (that is to say) on the 2d day

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of August, in the said third year of the Reign of our said Lord the KING, unlawfully, wickedly, seditiously, and maliciously published, and caused to be printed and published, a certain malignant, seditious, and scandalous Book and Libel, intitled "The North Briton;" in one part whereof, intitled "No. 45, Saturday, April 23, 1763," were then and there contained (amongst other things) divers malicious, seditious, and scandalous matters, to the effect in the Information set forth.

To this Information MR. WILKES pleaded not guilty; and Sir Fletcher Norton, who had in the mean time been appointed to the Office of his Majesty's Attorney General, joined Issue in that Character for his MAJESTY.

In the Sittings after Hilary Term, 1764, the Cause was tried by a Special Jury of the County of Middlesex; and Mr. WILKES was convicted of the Offences charged in the Information.

Before Judgment on this Conviction, Mr. WILKES absconded, and went abroad, and Proceedings to Outlawry were had against him upon this Conviction; and on the 1st November, 1764, he was outlawed; but in Easter Term, 1768, he was apprehended, by virtue of a Writ of "Capias utlagatum," directed to the Sheriff of Middlesex, and being brought into the Court of King's Bench, was committed to the Custody of the Marshal of that Court.

In the same Term, Mr. WILKES obtained a Writ of Error upon the Outlawry; and having assigned Errors thereon, the same were argued in that and the following Term, and the Court of King's Bench reversed the Outlawry for a defect of Form in the Return of the Sheriff to the Writ of "Exigent."

Mr. WILKES's Counsel, having surmised to the Court some Matters, which, if available, ought to have been moved in Arrest of Judgment, and for a new Trial, the Court relaxed their general Rule, requiring such Applications to be made within the first four days of the Term immediately following the Conviction, and indulged Mr. WILKES with leave to move then, as well in Arrest of Judgment, as for a New Trial.

Accordingly it was argued by the Counsel for Mr. WILKES,

that the Solicitor General was not the proper Officer, nor had any Authority to exhibit an Information; and that if he was vested with such Authority, it could only be temporary, during the vacancy of the Office of Attorney General; and it did not appear on the Proceedings, that the Office of Attorney General was at that time vacant; and on this ground it was moved that the Judgment should be arrested.

The Application for a new Trial was founded upon an Objection to an Order, made by the Lord Chief Justice of the Court of King's Bench, for amending the Information, after "Issue had been joined, and the Record of the Issue made up." But the Court unanimously over-ruled both the Objections, and took time to consider of the Judgment upon the Conviction till the 17th June 1768, when Mr. Wilkes, being brought into Court to receive Judgment, was sentenced to pay a fine of £. 500, and to be imprisoned ten calendar Months in the Custody of the Marshal.

There was another Information against Mr. Wilkes, for publishing an obscene and impious Libel, intitled an "Essay on Woman," which was filed in the same manner, and tried at the same time with the other; and upon this latter Information he was sentenced to pay another Fine of £. 500, and to be imprisoned for twelve calendar Months, to be computed from the Determination of the first Imprisonment.

To reverse these Judgments, Mr. Wilkes brought two several Writs of Error in Parliament, and assigned the following Matters for Error: 1st. That it did not appear that Sir Fletcher Norton, by whom the Informations were exhibited, had any lawful Power, Warrant, or Authority to exhibit them, and therefore the Judgment was not sufficient in Law to convict him. 2d. That he (Mr. Wilkes) was sentenced to be imprisoned for twelve Months, to commence at a future time; whereas such Imprisonment ought to have commenced at and from the time of giving the Judgment, and not at any future time. 3d. That there was a variance between the Record and the original Information, the word "purport" having been altered to that of "tenor."

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16th January, 1769.

AFTER hearing Counsel on these Writs of Error, the following Questions were put to the Judges:

1. "Whether an Information, filed by the King's Solicitor "General, during the vacancy of the office of the King's Attorney "General, is good in law?"

2. "Whether in such Case it is necessary, in point of Law, to "aver upon the Record, that the Attorney General's office was "vacant?"

Upon the Second Record:

3. "Whether a Judgment of Imprisonment against a Defend- "ant, to commence from and after the Determination of an Im- "prisonment to which he was before sentenced for another Offence, "is good in Law?"

And Sir JOHN EARDLEY WILMOT, Lord Chief Justice of the Court of Common Pleas, having conferred with the rest of the Judges present, acquainted the House, "that they all agreed in Opinion;" and then his Lordship delivered their Reasons.

AS to the first Question:

Same Day.

We think this Information, so filed, is good in Law.

By our Constitution, the King is entrusted with the Prosecution of all Crimes which disturb the Peace and Order of Society. He sustains the Person of the whole Community, for the resenting and punishing of all Offences which affect the Community; and for that reason, all Proceedings "ad Vindictam et Poenam" are called in the Law, the Pleas or Suits of the Crown; and in Capital Crimes, these Suits of the Crown must be founded upon the Accusation of a Grand Jury; but in all inferior Crimes, an Information by the King, or the Crown, directed by the King's Bench, is equivalent to the Accusation of a Grand Jury, and the Proceedings upon it are as legally founded; this is solemnly settled and admitted. As Indictments and Informations, granted by the King's Bench, are the King's Suits, and under his controul; Informations, filed by his Attorney General, are most emphatically his Suits, because

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they are the immediate emanations of his Will and Pleasure. They are no more the Suits of the Attorney General than Indictments are the Suits of the Grand Jury.

Indictments and Informations are both the Voices of those entrusted by the Constitution to awaken Criminal Jurisdiction, and to put it into motion. Who are those persons entrusted? A Grand Jury for all Crimes; the King's Bench, as well as a Grand Jury, for Misdemeanors of magnitude.

An Information, brought by the Attorney General for a Misdemeanor, is as much the Suit of the King, as Actions, brought by Attornies, are the Actions of their Clients, and not of the Attornies who bring them.

"The King sues by his Attorney," or "the Attorney sues for "the King," are only different forms of expressing the same thing. It is equally good either way, as appears by the Cases in 2 Lev. 82. and 3 Keb. 127; and no legal Reason, but good manners and decency, as Lord Hale calls it, have given the preference of one Form to another. It is the King, who, by his Attorney, gives the Court to understand and be informed of the Fact complained of.

Before the Statute, 4 and 5 W. & M. c. 18. every private man might lay his Complaint before the Court as the King's Complainant;—this was abused, and was checked by the Statute; but it left all other Informations as they were. What were then the King's Informations?—His right, of "Informing" the Court, was not subjected to the check which the Act set upon the right of Individuals.

The Legislature trusted the King as the great Constitutional Guardian of the peace of the Society. The mere suggestion of an Individual was too slight; he was under no Oath. The King is under the most solemn Sanction in every part of his great Office; and it is wise not to controul it; he is not to be put on a level with the meanest of his subjects.

The arguing that the Attorney General only, and no other Officer, was entrusted by the Constitution to sue for the King, either civilly or criminally, is a fundamental mistake. The Attor-

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ney General is entrusted by the King, and not by the Constitution; it is the King who is entrusted by the Constitution.

The great abilities of the Persons appointed to this Office have made it figure high in the imagination, and annexed ideas to it which do not belong to it; for he is but an Attorney, though to the King, and in no other or different relation to him than every other Attorney is to his Employer; and it is by degrees that he hath attained to that Rank which he now holds in the Law.

I find no traces of such an Officer for centuries after the Conquest; and that great Antiquarian, Spelman, under the word "Serviens ad Legem," considers him, upon the authority of Passages cited out of Bracton, as the great Officer for Pleas of the Crown, and thinks the King had a Serjeant in every County for that Purpose; and in the Proclamations made even at this day, before any criminal Trial begins, the King's Serjeant is mentioned, even before the Attorney; and the 5th Edward III. c. 13, which gives an Averment against the Sheriff's Return of Imprisonment in Cases of Outlawry at the King's Suit, mentions the King's Serjeant before the Attorney, and subjoins "or any that will sue for the King;" which is a strong indication that the King's Suits were not considered as then appropriated to his Attorney; and he had not then so much as the name of "Attorney General," which means no more than the person generally employed to sue and defend for the King, exactly in the same manner as the person generally employed by your Lordships, in your Suits, is called your Lordships Attorney, without putting the addition of "General" to it; and the Suits instituted by the King's Attorney, or by your Lordship's Attorney are both instituted, either by special and particular Directions, or under a general Authority, which is equivalent to a particular Direction for every particular Suit: and a Suit instituted by the Attorney General, is entitled the King and ————, and the Jury are sworn between the King and ——, in the same manner as in Suits between private individuals. Whether the King, when there is an Attorney or Solicitor General, might, by one of his Serjeants, or by his Solicitor, when there is an

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Attorney, now file either a Civil or Criminal Information, it is not necessary to determine; but the Passage, cited out of the Harleian Manuscript, does not decide in the Negative; for the first part, in Henry the Eighth's time, orders the King's Solicitor to stop one Prosecution and commence another. The Office of Attorney General was either vacant or full at that time. If vacant, it proves the Solicitor stands in his place: if full, it proves that by particular Order, the King's Suit is not inseparably attached to the Office of the King's Attorney.

The latter part of the Passage, containing the Resolution of the 1st and 2d James I. is only the adjustment of a dispute between the Attorney General and the King's Serjeant, whether the King's Serjeant could institute a Suit so as to privilege it with respect to Fees, &c. in the ordinary course of Proceeding; and it was determined to belong to the Attorney General, in opposition to the Serjeant's Claim: but it does not follow from thence, that the King, if he had pleased, might not have empowered one of his own Serjeants to have commenced it: and a special antecedent Direction could not be necessary; for if the King afterwards avows the Suit, and pursues it, it is a Principle and Maxim that "omnis rati-habitio mandato aequiparatur;" but there is no occasion in this Case to have any recourse to such a Ratification; for the Solicitor General is the "Secundarius Attornatus;" and as the Courts take notice judicially of the Attorney General, when there is one, they take notice of the Solicitor General, as standing in his place, when there is none. He is a known and sworn Officer of the Crown, as much as the Attorney; and, in the Vacancy of that Office, does every Act, and executes every Branch of it. But, whether it be the one or the other, they only echo the King's complaint, and his Application to the Court to act upon it. When the Attorney dies or is removed, must the great Criminal Jurisdiction of this Kingdom, in his Department, be suspended, till another is appointed? It is said the King may appoint one. But it is a matter of great deliberation and infinite consequence to have a person possessed of all the qualities necessary for that Office. Where is it to be found, that, in that interval, the noblest branch of the King's

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Regal Office becomes inactive, and the Subject's Right to Protection is in Abeyance? There is no such absurdity to be found in the Law; and an Hiatus in Government is so detested and abhorred, that the Law says, "the King never dies," that there may never be a "Cesser" of Regal Functions for a moment; but if this whimsical conceit were to take place, the death, or removal of the Attorney General, would suspend one of those Functions, though there was no Demise at all. That the Office of Attorney General devolves upon the Solicitor, is proved by such a chain of Authorities, as can leave no doubt in any man's mind upon this Question.

A course of Precedents and Judicial Proceedings in Courts of Justice, make the Law: it would be endless to cite Cases upon it. A course of Practice for a few years has been held to controul an Act of Parliament. The Case of Bewdley Corporation, in the 12th Queen Anne, 1 P. Williams, 207. Before the 4th and 5th of Queen Anne Juries were to come out of the Hundred of that place where the Action arose. This was attended with many inconveniences. That Law directed that the Jury should come out of the Body of the County; but a Practice had prevailed in the Crown Office, to award the "Venire de Vicineto," as before the Act. It was referred to all the Judges. Their unanimous opinion was delivered by Parker, Chief Justice. The constant Practice and Precedents, both in the Crown Office and Exchequer, being "de Vicineto;" they established the Practice, and said, "to make a contrary Reso- "lution in this Case, would be, in some measure, to overturn the "Justice of the Nation for several years past." There was an interval of five or six years in that Case—but here there is near a Century.

The King and the Earl of Devon, Easter, 3 Ja. II. (*a*) Though

(a) Middlesex. - - - Information filed by Sir Robert Sawyer, "Attorney General," against William Earl of Devon, states, that he on the 24th April, 3 J. II. "vi & armis," at the City of Westminster, in Middlesex, within the Palace of our Lord the King there, to wit, in Whitehall, (the King being then abiding in the said Palace) one Thomas Colepepper, Esquire, then and there in the Peace of God, and our fair Lord the King, did provoke and challenge to fight with him the said William Earl of Devon, with intention to kill and murder him the said Thomas, &c.]

Plea. - - - And now (that is to say) on Friday, next after the Morrow of the Ascension of our Lord, in this same Term, before our Lord the King at Westminster, comes as well Sir Thomas Powis, Knight, "Solicitor General" of the said King, who for our said Lord the King, now prosecutes in his proper person, as the said William Earl of Devon, in his proper person; and the said Earl says, &c.

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the Information was filed by the Attorney General, it was taken up by the Solicitor General, and shews the same powers. Proceedings were brought up into this Court, to found a Complaint upon; but there was no Writ of Error. The Judgment was never reversed. There was not the least Complaint. This House acted upon it. This is a Recognition of his Authority.

[Here the Chief Justice stated many Cases in the Exchequer, Chancery, and King's Bench; and particularly, the Queen and Lawson, Easter, 7th of Queen Anne, which was an Information exhibited in the Exchequer by Sir James Montague, "Solicitor General," and where the Judgment was affirmed by Lord Cooper. Holt and Treby.]

The Attorney General is no more a sworn officer of the King's Bench than the Solicitor General.

As to the 2d Question:

The inserting the Vacancy of the Office of Attorney General in the Record sometimes, and at other times omitting it, shews it was thought a matter of indifference. There are more Criminal Informations in the Exchequer, without those words than with them. At most it could be only an Irregularity, which would not make the Information void; because it is the King's Suit, and the Court is well founded in opening their Jurisdiction upon it; all Irregularities must be challenged in time, and if not challenged, are waived; and the Pleading and going to Trial are clearly a Waiver, if there had been any weight at all in this Objection; but we think there is none. In this Case, the Information, though filed by the Solicitor, is brought into Court by the Attorney, who was the same person who filed it. By so doing, he has adopted it; and it is become his Information to every intent and purpose whatsoever.

When filed—Process—when brought into Court—read over and charged with it. It is now done by the Officer—but it is for the Attorney. If there was any foundation—it should have been objected to then. If not, it must be considered as waived.

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On the 3d Question:

We are of opinion that the Defendant, being convicted of two Offences, it was necessary that two Judgments should be pronounced, one upon each Information.

Fine and Imprisonment, or other corporal Punishment, may be awarded for such Offences as are contained in these Informations.

The Kind, and the Quantity, are left by the Law to the Discretion of the Court, which passes the Sentence; and that Discretion is regulated by the nature of the Offence, and the circumstances which aggravate and extenuate it; by the state and condition of the Delinquent, and the Imprisonment he has already suffered; and that Discretion is always exercised with that lenity and compassion which do so eminently distinguish the Administration of Criminal Justice in this Kingdom.

That sound Discretion led the Court to Fine and Imprisonment, as the proper and adequate Punishment for these Offences. A very large Fine might have amounted to perpetual Imprisonment: a very small Fine must necessarily have produced a prolongation of the Imprisonment. By mixing them together, the keen edge of each is taken off, and the consequence of a large Fine, or a very long Imprisonment, carefully avoided.

A Fine of £.500, and ten months Imprisonment, is the Punishment for the treasonable Libel; a Fine of £.500, and twelve months Imprisonment, to commence from the Determination of the Former Imprisonment, is the Punishment for the blasphemous Libel. The Objection is, that the Sentence for the blasphemous Libel is erroneous, because the Punishment is not to take place till another Punishment is ended, either by effluxion of Time or other sooner Determination of it; which may be by a Reversal of that Judgment, or the King's Pardon; and that all Judgments are to take immediate effect, and not to commence "in futuro." In general, the language of all Judgments for Offences, respects the time of giving the Judgment; though the Punishment, directed to be inflicted, is in no Case inflicted immediately; and in many Cases,

the Judgment directs the Punishment to be "in futuro," and must be so according to the nature of the Punishment.

In Petit Larceny—to be whipt three Market Days successively—to set a man in the Pillory three times, at a week's or a month's distance—to find Security for good Behaviour from the end of a certain Imprisonment, or an uncertain one, as those Imprisonments are, where a Fine is to be paid.

In Treasons and Felonies—a certain known Judgment, which cannot be departed from, viz. in the present Tense of the subjunctive Passive: but in Misdemeanors, where Punishment is discretionary, the Limitation, as to Time, seems only to be, that the Punishment shall take place before a total dismission of the Party: a Punishment shall not hang over a man's head when he has been once discharged; that is properly a Punishment "in futuro." But whilst he remains under a state of Punishment, whilst he is suffering one part of his Punishment, he is very properly the object of a different kind of Punishment to take place during the continuance of the former, or immediately after the end of it. And every Case of this kind must depend upon the peculiar circumstances which attend it.

In this Case, it must be assumed, that Fine and Imprisonment were the proper kind of Punishment to be inflicted for these Offences; because the Court, intrusted by the Constitution with deciding upon the Punishment, has said so. The Facts and Circumstances which guided their Judgment, in that respect, are not before your Lordships. They hear a Report of the Trial, and Affidavits of every Fact which aggravates or alleviates the Offence; and therefore your Lordships must now proceed upon a supposition, that Fine and Imprisonment were the adequate Punishments to be inflicted for each Offence. You will be disposed to say and to think so, because they are the mildest and gentlest Punishments.

The Punishment might have been inflicted different ways.

1st. By Imprisonment for twelve months; but as he was already sentenced to ten months, it would have been only an Imprisonment for two.

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2d. By Imprisonment for twenty-two months; which would, in effect, have been for twelve.

But this would have been most grossly unjust, because if the first Judgment should be reversed, or he had been pardoned, he would have been imprisoned twenty-two months, when the Court only intended an Imprisonment of twelve.

3d. The Court might have laid a Fine of £.1,000, with a short Imprisonment for one Offence; and a small Fine, with an Imprisonment for twenty-two months for the other.

This would have been equally unjust—for the Offences are different, and have no relation to one another. The Prosecutions are distinct, and the Records as separate from one another as if there had been two separate Delinquents; and the Offences on each Record, must be as separately and distinctly estimated; and though Judgment happened to be passed at the same Time for both Offences, yet the Rule of admeasuring must be the same as if the Judgment had been pronounced at different times.

The Punishment must be proportioned to the specific Offence contained in the Record, upon which the Judgment is then to be pronounced; and must be neither longer nor shorter, wider nor narrower, than that specific Offence deserves. The balance is to be held with a steady even hand; and the Crime and the Punishment are to counterpoise each other; and a Judgment given, or to be given against the same person for a distinct Offence, is not to be thrown into either scale, to all an atom to either.

To lay a Fine of £.1,000 for one Offence, and twenty-two months Imprisonment for the other, when the Court thought a Fine of £.500, and an Imprisonment of ten months, was the proper and adequate Punishment for one Offence, and a Fine of £.500, and an Imprisonment of twelve months for the other, would have been twisting the two Offences and their Punishments together, and a departure from the first principle of distributive Justice, which commands all Judges to inflict that Punishment, and that Punishment only, which they think commensurate to the specific Crime before them; and it might have been productive of the same injus-

tice I have already mentioned, viz. the Judgment in one might be reversed or pardoned; and the Delinquent would then be subject to a larger Fine or a longer Imprisonment, than the Court intended to subject him to for one of the Offences only.

We cannot explore any mode of sentencing a man to Imprisonment, who is imprisoned already, but by tacking one Imprisonment to the other, as is done in the present Case.

It is not letting the Judgment for the first Offence vary the Punishment, or influence the quantum of it in the other; but only providing, from the situation of the Delinquent, to effectuate the Punishment the Court thought this Crime deserved. It is shaping the Judgment to the peculiar circumstances of the Case; and the necessity of postponing the commencement of the Imprisonment, under the second Judgment, arises from the Party's own guilt, which had subjected him to a present Imprisonment; and therefore the Question really is, Whether a man, under a sentence of Imprisonment for one Offence, can be sentenced to be imprisoned again for another Offence? If he can, this is the only Form by which it can be done consistent with Justice. If it cannot be done, then, in all Offences which are punishable only by Fine and Imprisonment, if a man has committed twenty, and has been sentenced to Imprisonment for one of them, he must be fined for all the rest, which will amount to perpetual Imprisonment with nine parts in ten of the people most likely to commit such Offences: Or an Imprisonment must be directed for every Offence after the first, inadequate and disproportionate to it.

For suppose twenty Offences of the same malignity, and meriting exactly the same Punishments—if six months Imprisonment were the punishment directed for the first Offence; the second must be twelve months; and, proceeding progressively, the twentieth must be ten years: and thus six months and ten years will be the punishment for Offences which ought to have been punished exactly alike. Or, if it be an Offence where Whipping or Pillory might be inflicted, the alternative of a moderate Imprisonment will not be in the power of the Court to inflict; but they will be under

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the necessity of laying a large Fine, or directing one of the other severe corporal Punishments.

In Dr. Bonham's Case, 8 Co. 107. The Charter granted by King Henry VIII. confirmed by an Act of 14 Hen. VIII. c. 5. gives the Censors of the College of Physicians a Power to punish Physicians for a mal and insufficient Administration of Physic, by Amercement, Imprisonment, &c.

Dr. Bonham was convened, examined, and found insufficient by the Censors. He was amerced £.5, to be paid at their next Meeting; and "deinceps abstineret, etc. quousque Inventus fuerit "sufficiens sub poena conjiciendi in carcerem, si in premissis delin-"queret."

He persevered to practice, and they summoned him again—He made default. The Censors ordered him to be arrested, and afterwards he came before them, and being asked to submit to their Authority, he refused; and they committed him, and awarded that he should continue in Gaol till they released him.

It appears from this Case, 1st. That he was under no prior Sentence of Imprisonment, as here.

2dly. That after the Judgment of his Insufficiency, he was dismissed, with a threat of Imprisonment only; and was afterwards committed to Prison for not submitting to their Authority.

Whereas the Delinquent here was never dismissed, nor out of Custody, for a Moment.

3dly. It was a special Power and Authority of a very singular and despotic nature, committed to private persons, and therefore to be executed strictly; and when they are empowered to imprison, if they find a person insufficient, the Punishment must immediately follow the Judgment; because, if suspended a day, it might be suspended a year. If totally dismissed, and the Party is at liberty, the power over him is determined.

So in the Case of the 27th of Henry VII. Y. B. on the Statute of Westminster 2d. 13 Edward I. c. 11.; if Bailiffs, &c. are found in Arrear, "arrestentur corpora eorum, et per testimonium Audi-

"torum ejusdem compoti, mittantur et liberentur proximae Goalae "Domini Regis in partibus illis."

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No time was limited; they must commit immediately.—In that Case, it was contended on the Plea, that he had been at large; and then their Power over him was determined, and so that what they did after, was "tortious." It was a special Power and Authority, to be exercised strictly; and therefore held that the Commitment must be to the next Gaol, whether in the County or not; and if false Imprisonment was brought against Auditors, they must shew that they pursued their Power. And the same answer applies to the other Cases upon the Statutes of forcible Entries.

[He then cited various other Precedents, particularly the Case of The King and Dalton, 3 Geo. I. 1716, in which the first Judgment was given in July preceding, upon an Indictment for seditious Words against the King; and the Punishment was a Fine of twenty-five Marks and Commitment for one year, and to find Sureties for three years. There was a second Conviction, in July, of a like Offence, and Judgment of a Fine of twenty-five Marks and Commitment "pro spacio unius anni integri post expirationem prior: "Judic: Imprisonament: versus eum nuper adjudicatum."]

IN Answer to the Questions therefore proposed by your Lordships, our unanimous Opinion is:

1st. That an Information, filed by the King's Solicitor General, during the Vacancy of the Office of Attorney General, is good in Law.

2dly. That in such a Case, it is not necessary, in point of Law, to aver upon the Record that the Attorney General's Office was vacant.

3dly. That a Judgment of Imprisonment against a Defendant, to commence from and after the Determination of an Imprisonment to which he was before sentenced for another Offence, is good in Law.

WHEREUPON it was ORDERED and ADJUDGED, that the Judgments of the Court of KING'S BENCH be

AFFIRMED (*a*).

(*a*) Vide Journals of the Houfe of Lords, Vol. 32, p. 222.

The KING *v.* AUSTEN and others.

The KING *v.* LEWIS.

[On two several Writs of Extent.]

1821.

Saturday, 3d February.

Course of proceeding on the part of an insolvent debtor of the Crown, in prison under an extent, for the purpose of obtaining his discharge under the 1st of Geo. IV. ch. 118, sec. 41, by supersedeas quoad corpus.

Walford, on a former day, applied for an order for the discharge of the Defendant *Lewis,* detained in custody of the Marshall of the King's Bench, under a writ of *capias* on this extent, upon which he had been a prisoner charged in execution since the 31st of *October*, 1816, pursuant to the statute for the relief of Insolvent Debtors, (1st *Geo.* IV. ch. 119, sect. 41,) on an affidavit stating circumstances of his imprisonment, notice having been given to the sureties of the original Crown Debtor, who had paid the debt due to the Crown.

This Court is not bound by the general provisions of the act, in respect of insolvent persons applying to the Court of Insolvent Debtors, or to the Quarter Sessions for their discharge out of custody: the 41st section of the statute has given the Barons of the Exchequer an independent and discretionary power to discharge insolvent Crown debtors, on an investigation of the whole case.

Upon that occasion, the Court observed that the motion should be made on a petition to be presented, supported by affidavit, praying an order that the Defendant might be brought up to examined on oath respecting his property, that the Court might be enabled to judge of the merits of the application: and that notice should be given to the Crown*, as well as to the sureties; the petition to be accompanied with a statement containing an enumeration and description of his property.

*The Court being asked, whether the notice should be served on the Treasury, or other department of the revenue, intimated, that all such notices must in every case be served on the Attorney General, as the only legal representative of the Crown recognized in this Court: and that they could not judicially notice the Treasury, or any of the revenue boards.

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The King v. Austen and others, &c.

The motion being subsequently renewed as prescribed, an order was made that the Defendant should be brought to the Court upon this day, touching the matter of his application: and it was made part of the order, that a copy should be served on the Attorney General, and on the surviving surety of the Crown Debtor, and the personal representative of the other who was dead. Service upon the Clerks in Court of the Attorney General, and the other parties, to be sufficient.

The Defendant was now brought up and examined by the Court. From the written statement, purporting to be an enumeration and description of his property, debts, and effects, it appeared that the remnant of the insolvent's property was encumbered beyond its value, and a series of unsuccessful speculations, and failures, and other misfortunes was detailed, with various hopeless claims on persons not to be found, or in desperate circumstances. That paper concluded with stating, that since the foregoing statement had been served on the sureties, the insolvent had obtained the means of furnishing the following *further* account of certain property in which he had once had, and might possibly be supposed still to have an interest. It consisted of two leases of land in *Paddington,* for a term of ninety-nine years, from the trustees, under Acts of Parliament, his interest in which he had sold, on account of not being able to pay up the arrears of ground rent, in consideration of an annual sum to be paid to him, to commence on *Michaelmas* 1822 and *Michaelmas* 1823: and that he had afterwards assigned that charge to a Creditor, (in *August* last) on account of a debt previously due to him from the insolvent.

The Attorney General did not appear on the order to resist the application, on the part of the Crown.

West, on the behalf of the sureties of the Crown Debtor, opposed the applicant's discharge. His objections were founded on the insolvent's own statement; and were,

1st, That the enumeration and description of his property therein, were so uncertain, vague, and loose, as to furnish no real or tangible information; and,

2ndly. That he had acknowledged the assignment of property, since he had been in prison.

He therefore submitted that the insolvent was not entitled to his discharge, on the grounds of concealment of his property, and having been guilty of fraudulent preference; citing the various sections of the act on which those objections were founded.

The Court, however, declared themselves of opinion, that the only section of the statute which applied to the case of *a Crown Debtor* seeking to be discharged under the act, by application to this Court, was the 41st; and that that section had given them a discretion to make or refuse the order, as they should think fit, upon consideration of the whole case, without reference to any of the causes of detention, provided for generally in the act in ordinary cases between subject and subject; and that they were not bound by any of the provisions of the act, which were confined to the Insolvent Debtor's Court, and the Court of Quarter Sessions.

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In this case they considered that the objections to the Insolvent's application were not satisfactorily established, or of sufficient weight to require them to withhold his discharge, under all the circumstances before them. And therefore, taking into consideration the long imprisonment which he had already undergone, they granted the application, and made an

Order—That a *supersedeas quoad corpus* should issue.